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IN THE

Supreme Court of the United States

October Term, 1963

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENTS, COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, AND T. J. McILWAINE, JR., DIVISION SUPERINTENDENT OF SCHOOLS OF SAID COUNTY

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PRELIMINARY STATEMENT

This brief is filed on behalf of the respondents, County School Board of Prince Edward County and the Division Superintendent of Schools of that County. Since the beginning of this phase of this case in the summer of 1960, these respondents were represented by Collins Denny, Jr., of Richmond, Virginia, as their chief counsel. It was the firm conviction of Mr. Denny that this case involved some of the most important constitutional questions ever to arise. Though throughout the years involved he was plagued by an illness to which a lesser man sooner would have suc-

cumbed, Mr. Denny dedicated his ability, experience, high principles and health to this now famous struggle in an effort properly to present the constitutional principles to which he was so deeply devoted. Mr. Denny died January 14, 1964, eight days after *certiorari* was granted, and with his death an irreplaceable loss has occurred. Thus it is that his name does not appear on this brief and that he will not be at the bar of this Court when those vital issues are determined.

QUESTIONS PRESENTED

In its *per curiam* opinion granting *certiorari*, the Court put this case down for hearing on the merits "without waiting for final action by the Court of Appeals." For this reason, the School Board assumes that all questions that were before the District Court are now before this Court. In this brief, the School Board will treat the questions involved so far as they relate to the School Board—it will not treat questions that are peculiar to the other respondents. The questions are:

I. Whether the amended supplemental complaint filed by petitioners upon which the proceedings now before this Court are based presents a new and different cause of action from that presented in the original complaint and hence should be dismissed?

II. Whether any action has been taken by respondents which violates any constitutional rights of petitioners?

STATEMENT OF THE CASE

The "Statement" by petitioners is totally inadequate to a proper determination of the issues in this case—thus, a rather lengthy statement by respondents is necessary.

I.

History of the Litigation

As stated by petitioners, this suit was instituted in 1951 in the District Court and was one of the school segregation cases decided in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294. Defendants were the County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools for Prince Edward County—they were the only defendants.

Petitioners then enumerated the decisions of the District Court and the Court of Appeals which have been rendered since the decision of this Court in *Brown* v. *Board of Education*. Three of the District Court's decisions [142 F. Supp. 616 (1956); 149 F. Supp. 431 (1957); and 164 F. Supp. 786 (1958)] and two of the Court of Appeals' decisions [249 F. 2d 462 (1957) and 266 F. 2d 507 (1959)] were rendered in connection with the implementation of the holding of *Brown* v. *Board of Education*, 349 U. S. 294, and at that time the School Board and the Division Superintendent of Schools were the only defendants.

Subsequent to the last-mentioned decision of the Court of Appeals, 266 F. 2d 507, which was rendered on May 5, 1959, the Board of Supervisors failed to appropriate money to the School Board for the ensuing school year. On April 22, 1960, the petitioners (plaintiffs below) presented to the District Court an order in accordance with the mandate of the Court of Appeals, which order was entered (R. 18).

In June, 1960, petitioners moved the District Court for leave to file a supplemental complaint and to make the Board of Supervisors of Prince Edward County, the State Board of Education and the Superintendent of Public Instruction for the Commonwealth of Virginia parties defendant (R. 2). This motion, though opposed by the original de-

fendants, was granted by the District Court (R. 3), whereupon all defendants, new and old, moved to dismiss the supplemental complaint (R. 4). These motions were never heard. After the lapse of several months, petitioners on January 13, 1961, moved the District Court for leave to file an amended supplemental complaint and to add the Treasurer of Prince Edward County as another party defendant. This motion was granted by order entered April 24, 1961, over the opposition of all who were then defendants (R. 5). Within a week each defendant filed a motion to dismiss the amended supplemental complaint (R. 6), and, in substance, each of those motions was predicted in part on the ground that the amended supplemental complaint alleged a new cause of action different from that alleged in the original complaint, that the relief sought was alien to that sought in the original complaint, that the relief was sought against persons not parties to the original suit and who were foreign to the relief sought therein.[1]

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[1] The amended supplemental complaint prayed for relief against all defendants as follows:

"(a) From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia;

"(b) From expending public funds for the direct or indirect support of any private school which, for the reason of race, excludes the infant plaintiffs and others similarly situated;

"(c) From expending public funds in aid of, or in reimbursement of money paid for, the attendance of any child at any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated;

"(d) From crediting any taxpayer with any amount paid or contributed to any private school which, for reason of race, excludes the infant plaintiffs and others similarly situated; and

"(e) From conveying, leasing, or otherwise transferring title, possession or operation of the public schools and facilities incidental to the operation thereof in Prince Edward County, Virginia, to any private corporation, association, partnership or individual" (R. 28).

The motion of the School Board further requested that if the motion to dismiss were overruled, at the least all allegations and prayers of the amended supplemental complaint other than those relating to the sale of school properties be dismissed as to the School Board because none of the other allegations and prayers related to it (R. 155).

At this juncture on April 26, 1961, the United States moved the District Court for leave to intervene as a plaintiff; to add as parties defendant the Prince Edward School Foundation, the Comptroller of Virginia, and the Commonwealth of Virginia; and to file a complaint in intervention (R. 128). With one exception the prayers for relief of the complaint in intervention were the same as those of the amended supplemental complaint. That exception was that the United States sought to enjoin the Commonwealth of Virginia, the State Board of Education, the Superintendent of Public Instruction and the State Comptroller "from approving, paying, or issuing warrants for the payment of any funds of the state for the maintenance or operation of public schools anywhere in Virginia for so long as and during such period as the public schools of Prince Edward County are closed * * *." (R.141) In an unreported opinion of June 14, 1961 (R. 162), the District Court refused to allow intervention by the United States. It there recognized that the question whether an injunction should issue restraining the State from expending funds for the maintenance of public schools anywhere in Virginia so long as such schools remained closed in Prince Edward County was not in the case (R. 173). Speaking of the question raised by the complaint in intervention, the District Court said:

> "These are not questions of law or fact in common with the main action. To the contrary, they are new

> and independent assertions, which admittedly are not alleged in the amended supplemental complaint." (R. 174)

Also on June 14, 1961, the District Court overruled the motions of the School Board and other defendants to dismiss the amended supplemental complaint without prejudice to their right to renew them upon the conclusion of the hearing on the merits which was set for July 24, 1961 (R. 159). The motions were so renewed (R. 198).

On August 23, 1961, the District Court rendered an opinion—*Allen* v. *County School Board*, 198 F. Supp. 497 (R. 52)—in which it held that several sections of the Virginia Constitution and statutes required interpretation before it could answer the following question:

> "Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?"

The District Court therefore deferred its ruling on that question until the Supreme Court of Appeals had passed upon the matter (R. 57, 58). Further, it enjoined the payment of state and local tuition grants so long as the public schools in Prince Edward County remained closed (R. 62, 64). Finally, upon a finding that there was no evidence that the School Board had leased or transferred or intended to lease or transfer school property, the prayer for injunctive relief relating thereto was denied (R. 65, 67).

A petition for mandamus was filed by petitioners in the Supreme Court of Appeals of Virginia against the Board of Supervisors seeking to compel it to appropriate sufficient funds for the operation and maintenance of public schools

in the County, the Board of Supervisors filed its answer, the District Court reviewed the pleadings and in its order of November 16, 1961, held that an "appropriate suit" had been timely instituted seeking a determination of the question posed in the opinion of August 23, 1961 (R. 66).

As stated by the Court of Appeals, plaintiffs then "aborted the effort to have the relevant question decided by the state courts" when they, in their brief in the mandamus proceeding, "disclaimed the presence of any federal question." *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (1963) at page 334 (R. 212). In light of that disclaimer, the Supreme Court of Appeals of Virginia decided only the question of state law. It held that under Section 136 of the Constitution of Virginia it is discretionary with the Board of Supervisors whether it will make an appropriation to the School Board for the maintenance and operation of schools. It also held that mandamus will not lie to compel the Board of Supervisors to exercise that discretion in favor of an appropriation. *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 227 (1962).

On May 1, 1962, all defendants moved the District Court to dismiss the amended supplemental complaint or, in the alternative, to further abstain until plaintiff submitted to the Supreme Court of Appeals of Virginia the question which it previously had withdrawn from that court (R. 117).

Also on May 1, 1962, the School Board and the Division Superintendent of Schools renewed their motions to dismiss, which motions the District Court had not yet determined. They further moved that the amended supplemental complaint be dismissed as to them on the ground that it contained no allegation against the Division Superin-

tendent and that the District Court had already held [2] that there was no evidence to support the only allegation against the School Board—namely, that it was contemplating the lease or transfer of public school property (R. 202).

On May 18, 1962, the above motion was argued (R. 14). The court indicated that it would not dismiss the amended supplemental complaint as to the School Board, whereupon the School Board moved for summary judgment in its favor upon Section V (Paragraph 16) of the said amended supplemental complaint—that being the section in which the contemplated sale or transfer of school property was alleged. The court granted that motion and by order entered May 24, 1962, it dismissed Section V of the amended supplemental complaint and directed the clerk to enter final judgment in favor of the School Board on that cause of action (R. 69).

On July 25, 1962, the court rendered an opinion in which it held:

> "* * * that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers." *Allen* v. *County School Board*, 207 F. Supp. 349, at page 355 (R. 80).

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[2] In its opinion of August 23, 1961, the District Court held:

> "There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied" (R. 65).

In its order of November 16, 1961, the District Court held:

> "There being no evidence that the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property, the plaintiffs' prayer for injunctive relief is denied" (R. 67).

In that opinion of July 25, 1962, the court denied defendants' motion to abstain until plaintiffs brought the proper questions before the state courts so the School Board filed a petition for declaratory judgment in the Circuit Court of the City of Richmond raising the pertinent questions. The defendants again asked the District Court to defer until the courts of the Commonwealth passed on those questions. This motion was denied by opinion and order entered October 10, 1962 (R. 82). (The word "order" was omitted from the caption in the printing.)

Also on October 10, 1962, the court entered an order in accordance with its opinion of July 25, 1962. The appeal to the Court of Appeals for the Fourth Circuit followed.

The opinion of the Court of Appeals is found at 322 F. 2d 332, and in the printed record at page 209. So far as the School Board is concerned, that court held: The School Board "has received no funds with which it could operate schools" (R. 211); there "was no evidence that any one had any idea the school buildings and property owned by the School Board would be sold or leased" (R. 213); that the Prince Edward School Foundation "has used none of the facilities of the School Board" (R. 214); and that the "Plaintiffs' theory may also be summarily dismissed insofar as it is viewed as a contention that the closure of the schools was a violation of the order of the District Court entered in compliance with the direction of this [Fourth Circuit] Court" (R. 215). It explained the latter holding by saying:

> "The injunctive order, entered when the School Board and its Division Superintendent were the only defendants, required them to abandon their racially discriminatory practices. Without funds they have been powerless to operate schools, but, even if they had pro-

> cured the closure of the schools, they would not have violated the order for they abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination." (R. 215)

The Court of Appeals held that the principal issues raised by the amended supplemental complaint required an interpretation of the Virginia Constitution and statutes by the Supreme Court of Appeals of Virginia. It then vacated all the judgments of the District Court with instructions to abstain until the case of *County School Board* v. *Griffin*, then pending before the Virginia Supreme Court of Appeals, was decided, "with leave" to the District Court thereafter to take such action as would then be appropriate in light of the determination of the state law. *Griffin* v. *Board of Supervisors*, *supra*, 322 F. 2d at page 336 (R. 228).

On December 2, 1963, the Supreme Court of Appeals handed down its opinion which is reported as *County School Board* v. *Griffin*, 204 Va. 650, 133 S.E. 2d 565. That decision will be discussed more fully hereafter.

At this point reference should be made to the statement of petitioners on page 4 of their brief. This statement forms the real basis of their case under the amended supplemental complaint. That statement is:

> "Despite the prolixity of judicial pronouncements in ten long years of litigation, Dorothy Davis and an entire generation of Negro children of public school age have forever lost *their constitutional rights to a public school education unimpaired by the burden of racial discrimination.*" (Emphasis supplied.)

By that statement of the alleged rights of petitioners, and similar statements contained elsewhere in their brief, peti-

tioners attempt to pull themselves up by their own bootstraps. True it is "that racial discrimination in public education is unconstitutional." *Brown* v. *Board of Education*, 349 U. S. 294, at page 298. But it has never been held that there is a constitutional right to a public school education. As will be discussed hereafter, this question, to which petitioners assume the answer, should not be decided in this case.

II.

Facts Relative to the School Board

In the last decision of the Court of Appeals prior to the filing of the amended supplemental complaint and the addition of new parties defendant, and at a time when the School Board and the Division Superintendent of Schools were the only defendants—*Allen* v. *County School Board*, 266 F. 2d 507 (May 5, 1959)—the Court of Appeals held at page 511:

> "* * * that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the *high schools operated by the defendants in the County;* * * * (Emphasis supplied.)

Up until that time and thereafter through the 1958-59 school term, the School Board operated public schools in Prince Edward County. In the spring of 1959—and of every year subsequent thereto until the present—pursuant to state law, the Division Superintendent of Schools with the advice of the School Board prepared and submitted to the Board of Supervisors an estimate of the amount of money

needed for support of public schools and, in the alternative, an estimate of the amount of money needed for educational purposes in the County for the next school year. Upon the basis of those estimates the Division Superintendent requested the Board of Supervisors to make the necessary levy or appropriation for the operation of public schools or for educational purposes. The foregoing was done in compliance with Sections 22-120.3 and 22-120.4 of the Code of Virginia. *County School Board* v. *Griffin, supra,* 204 Va. at page 654, 133 S.E. 2d at page 568. See also exhibits 12, 13 and 14, filed in proceedings of July 24-27, 1961, in District Court (Tr.[3] 46, 47). On June 3, 1959, the Board of Supervisors refused the request of the School Board to make such levy or appropriation, thus leaving the School Board without funds with which to operate public schools for the 1959-60 school year. The requests of the School Board for 1960-61, 1961-62 and 1962-63 school years were likewise refused, rendering the School Board powerless to operate schools. *Griffin* v. *Board of Supervisors, supra,* 322 F. 2d at pages 334, 336 (R. 211, 215). Thus, the public schools have remained closed.

This Court should be cognizant of the fact that the School Board has been deeply concerned that a substantial segment of the children of the County have been without schools. It has made its properties available to any responsible group for use by these children.

The record shows that in June, 1961, the School Board offered to the Virginia Teachers Association (an association of Negro school teachers) the public school buildings of the County, buses, utilities, and janitorial services for the use by the Virginia Teachers Association without cost

[3] Transcript of trial proceedings, July 24-27, 1961.

in an educational program that it was going to conduct (R. 178). That offer was rejected (Tr. 370, 371).

Petitioners have mentioned that on "the initiative of the United States, formal educational opportunities are now being made available to these [Negro] children in the County * * *" (Petitioners' brief, page 7). Previous offers by the white citizens of Prince Edward County to assist in such undertaking were rejected.[4] So the truth of the matter is that the United States, through a special assistant to the Attorney General[5] acted as a catalyst in bringing together various interests and, further, enduced the Negro people of the County to avail themselves of private educational facilities. These schools are being conducted and operated in buildings owned by the School Board of the County which have been made available for use of the Prince Edward Free School Association, together with buses and other equipment. The School Board receives from the Association only a sum estimated to cover the cost of insurance, maintenance, repairs and janitorial services. The trustees of the Association are six Virginia educators—three Negro and three white.

III.

The Virginia System

The decisions of the Supreme Court of Appeals of Virginia conclusively settle the relative duties and obligations of the respondents with respect to the nature of the Virginia system of education. *Griffin* v. *Board of Supervisors*, 203

[4] The Court of Appeals found that the Negro citizens of Prince Edward County "declined proffered assistance" in providing schools for their children. *Griffin* v. *Board of Supervisors*, 322 F. 2d 332, at page 335 (R. 214).

[5] William J. vanden Heuvel.

Va. 321, 124 S.E. 2d 227 (1962); *County School Board* v. *Griffin*, 204 Va. 650, 133 S.E. 2d 565 (1963). However, a somewhat detailed analysis of this system is necessary to a proper determination of the powers and duties of the School Board and Division Superintendent. And a determination of these powers and duties must be made in order properly to decide whether the actions of these respondents violate any constitutional rights of petitioners.

The Constitution and laws of Virginia contain provisions which enable a locality to establish, maintain and operate public schools if it so desires, and they also make provision to further and strengthen the "liberty" of parents and children in educational matters of which this Court spoke so eloquently in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), by providing scholarship grants to assist parents in educating their children elsewhere.

The Virginia Plan therefore envisions much more than public schools in those localities which may desire to have them. Under the permissive authority of Section 141* of the Constitution, the General Assembly has made an appropriation for education purposes in furtherance of elementary and secondary education of Virginia students in public and in non-sectarian private schools other than those owned or exclusively controlled by a county or city or town. This it has done by enacting Sections 22-115.29, *et seq.*, of the Code of Virginia (1950), as amended, and by certain items of the Appropriation Acts.

These sections of the Code provide a state scholarship grant for *each* child desiring to attend a non-sectarian private school or a public school outside the locality in which he resides. They permit local governing bodies to appropriate

* The pertinent sections of the Virginia Constitution are set forth in an appendix hereto.

funds to provide local scholarships and, if a local governing body makes no such provision, the Superintendent of Public Instruction under regulations of the State Board provides for such payment. In that event, a like amount is deducted from state funds appropriated for distribution to that county, provided that no deduction is made from funds available to the locality for operation of public schools or for welfare. In addition, a locality may make appropriation for educational purposes in furtherance of the education of its children under uniform regulations as it, by ordinance, may provide. Such an ordinance was that adopted by the Board of Supervisors of Prince Edward County on July 18, 1960 (R. 108), designated in this proceeding as an ordinance "in aid of education."

Appropriations for the state scholarship grants are made to the Governor of Virginia, not to the State Board of Education.

It thus appears that the State itself unconditionally establishes State aids, and enables local aids, to Virginia's children in obtaining educational advantages in private, nonsectarian schools wherever located and also in public schools outside the residence of the child. Also the State has set up a system for public schools pursuant to which any locality that desires may establish, maintain and operate public schools and subject to varying conditions the State will assist therein.

A.

THE VIRGINIA PLAN FOR PUBLIC SCHOOLS

An analysis of the Constitution of the Commonwealth of Virginia, the statutes adopted pursuant thereto, and decisions of the Supreme Court of Appeals of Virginia will clearly demonstrate that the public schools in Virginia are not and have not since 1902 been established, maintained

and operated by the State but rather by the political subdivisions of the State. This analysis will further demonstrate that within each political subdivision the governing body has the absolute responsibility and authority to determine the amount, if any, of local funds which shall be appropriated for school purposes and the local school board has the absolute responsibility and authority to determine how those funds shall be expended for school purposes.

Though the genesis of public schools in Virginia was in 1796 under the influence of Thomas Jefferson (Buck, *The Development of Public Schools in Virginia 1607-1952*, page 27), it was not until the Constitution of 1869 that serious attempt was made to establish them. The provisions of that Constitution dealing with schools were substantially incorporated into the Constitution of 1902, the present Constitution, with one important exception. The Constitution of 1869 did not preserve to the localities the primary voice in establishing, maintaining and operating such schools as they might think proper. Thus the vital difference between the Constitution of 1869 and that of 1902 is that the latter makes localities autonomous subdivisions where basic school matters are concerned. In discussing the sections of the 1902 Constitution reference will be made to some of the significant changes from the 1869 Constitution to illustrate that difference.

We begin with Section 129 of the Constitution of 1902 which provides:

> "The General Assembly shall establish and maintain an efficient *system* of public free schools throughout the State." (Emphasis supplied.)

That section on its face is not self-executing but requires legislation to carry it into effect. *County School Board* v. *Griffin*, *supra*, 204 Va. at 660, 133 S.E. 2d at 573. Accord-

ingly had the General Assembly failed to establish a "system," the courts would have been powerless to compel action by it or to inaugurate a system themselves.

But the General Assembly has not failed to carry out the mandate of Section 129. It has adopted a school code which is now found in Title 22 of the Code of Virginia and by the adoption thereof it has complied with the requirements of the Constitution. It was specifically so held in *Scott County School Board* v. *Board of Supervisors*, 169 Va. 213, 193 S.E. 52 (1937), cited in *County School Board* v. *Griffin*, *supra*:

> "The Constitution provides that it shall be the duty of the General Assembly to provide and maintain the public school system (Constitution, Section 129), and the General Assembly has complied with that requirement by the enactment of a School Code, * * *." (169 Va. at page 215, 193 S.E. at page 53.)

The School Code of which the court spoke in the case just cited was in all substantial features the School Code which we have today.

Thus, the highest court in Virginia has held the mandate of Section 129 to have been met by the adoption of the School Code. It is therefore clear that the *Constitution* of Virginia does not require the establishment, maintenance, or operation of a single school any place in the State—it only requires the establishment and maintenance of a "system." Nor does the *School Code* require the establishment, maintenance or operation of any school anywhere—it does, however, provide the "system" for the establishment, maintenance and operation of schools throughout the State. *County School Board* v. *Griffin*, *supra*, 204 Va. at pages 660, 667, 133 S.E. 2d at pages 572, 577. This duty and power imposed and conferred by Section 129 was

spoken of by the Chief Justice of Virginia in a concurring opinion in *Almond* v. *Giles*, 188 Va. 1, 49 S.E. 2d 431 (1948), as

> "the plenary power of the legislature *to provide the means to maintain and establish* an efficient public school *system.*" (Emphasis supplied.)

The other sections of the Constitution of Virginia pertaining to schools bear out and are consistent with this conclusion.

Section 130 provides:

> "The general supervision of the school *system* shall be vested in a State Board of Education, * * *." (Emphasis supplied.)

Section 133 provides:

> "The supervision of *schools* in each county and city shall be vested in a school board, * * *." (Emphasis supplied.)

A provision similar to Section 130 was contained in the Constitution of 1869 (Art. VIII, Sec. 1), but it did not contain a provision similar to Section 133. This latter section in the Constitution of 1902 therefore imposes a duty on *local* officials not theretofore imposed.

Section 132 of the Constitution imposes four duties upon the State Board of Education other than the general duty of general supervision of the school system imposed by Section 130. They are to (1) divide the State into school divisions and to certify to the local school board a list of eligible persons for the position of Division Superintendent of Schools; (2) manage and invest the school (literary) fund under regulations provided by law; (3) make rules and

regulations for management and conduct of schools as the General Assembly may prescribe; and (4) select textbooks and educational appliances for use in the schools.

There is no duty on the State Board to establish, maintain or operate schools.

We turn now to the sections of the Constitution that contain the provisions relative to school funds. First, there is Section 135 which sets aside moneys from three sources "to the schools of the primary and grammar grades for the equal benefit of all the people of the State to be apportioned on the basis of school population." These funds, hereafter called "constitutional funds," are the only moneys which the Constitution of Virginia *requires* to be devoted to the public schools and their use is restricted to the "primary and grammar grades." During the school year 1960-61, Prince Edward's portion of this fund was $39,360.00. That section also provides:

> "and the General Assembly shall make such other appropriations *as it may deem best*, to be apportioned on a basis to be provided by law." (Emphasis supplied.)

Clearly, the above-quoted language is discretionary.

Section 136 of the Constitution deals with local school funds and provides in part that the local political subdivision

> "is authorized to raise additional sums by a tax on property * * * to be apportioned and expended by the local school authorities of said counties, cities, towns and districts *in establishing and maintaining such schools as in their judgment the public welfare may require.*" (Emphasis supplied.)

Under this portion of Section 136 the locality has the power to raise additional funds for school purposes by local taxation. Under the Constitution of 1869, localities had this

power (Art. VIII, Sec. 8). Also under Section 136 the local school board has the exclusive authority to determine what schools shall be established and maintained and for what the school moneys shall be used. Under the Constitution of 1869 the localities had no such authority.

It has always been very clear in Virginia that no locality was under any obligation to levy any local tax for schools or to appropriate one dollar for schools. If there had ever been any doubt on that subject, that doubt was removed by *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 277 (1962), wherein it was held that there is no obligation or duty upon the governing body of a locality to levy any tax or appropriate any money for school purposes.

The only limitation on the exercise by the local school board of its judgment is that:

> "Such primary schools as may be established in any school year shall be maintained at least four months of that school year before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade." (Section 136, Constitution of Virginia.)

We previously pointed out that Section 135 of the Constitution provides that the General Assembly, in addition to the constitutional funds, which it must appropriate, may make other appropriations for school purposes as it may deem best. Pursuant to this power, the General Assembly has enacted Code Section 22-119 which provides that moneys received from the "Forest Reserve Act" shall be apportioned and paid to the treasurer of each county who shall "place the funds to the credit of the public schools of his county." Under this section Prince Edward received $2,644.40 for the school year 1960-61.

Thus the School Board of Prince Edward County receives from the constitutional funds and forest reserve funds irrespective of any action taken by the Board of Supervisors an amount of money totally inadequate to operate schools. *County School Board* v. *Griffin, supra*, 204 Va. at 664, 133 S.E. 2d at 575.

Since the Constitution of Virginia does not require the Board of Supervisors to appropriate money to the School Board (*Griffin* v. *Board of Supervisors*, 203 Va. 321, 124 S.E. 2d 227 (1962)), there are no funds, save the ones just mentioned, available to the School Board to establish, maintain and operate public schools in Prince Edward County if the Board of Supervisors fails or refuses to make a levy and appropriation for school purposes. This is true with respect to funds for the construction of schools and funds for the operation and maintenance of schools.

Since this case does not involve construction of schools, it is sufficient to point out that not even the General Assembly of Virginia can direct a board of supervisors to levy taxes for school purposes or direct that a particular school be erected. The Supreme Court of Appeals of Virginia so held in *School Board of Carroll County* v. *Shockley*, 160 Va. 405, 168 S.E. 419 (1933), wherein it considered the validity of an Act of the General Assembly directing the imposition of certain local taxes, the proceeds of which were to be used by the school board in erecting a particular school. The court held that this act violated Section 136 of the Constitution in two particulars. First, it pointed out that it is for the local governing body to determine what sums, if any, should be raised by local taxation for school purposes, and, second, it pointed out that it is for the school board to determine what schools shall be established and maintained. The holding in that case was reaffirmed in

County School Board v. *Griffin*, 204 Va. 650, 133 S.E. 2d 565 (1963).

Funds appropriated by the General Assembly for use by the local school boards in establishing, maintaining and operating schools are appropriated only upon condition that the board of supervisors of a county or council of a city, as the case may be, has raised and appropriated certain local moneys for school purposes—in other words, to "match" funds—and on condition that certain things be done in the management and operation of the schools. Unless the local governing body—the body directly responsible and responive to the people of the locality—desires that there be public schools in the locality and is willing to use local funds to further that purpose, the local school authorities are powerless to carry on public schools. They cannot borrow money on a long term basis without the approval of the qualified voters of the locality—Constitution, Section 115a; they cannot make temporary loans without approval of the local governing body—Code Section 22-120.

That state moneys, other than the "constitutional funds" and moneys derived from the "Forest Reserve Act," are apportioned only on a conditional or a matching basis is demonstrated by the uncontradicted testimony of J. G. Blount, Jr., who has been connected with the State Department of Education for more than thirty years and is Director, Division of Administration and Finance (Tr. 466). He is the official of the Department of Education who deals with state appropriations for educational purposes. After reviewing the Appropriation Act of 1960, which was similar to the Acts under which funds have ever been appropriated to school boards, (Tr. 488), he testified that no state money other than the two funds just mentioned are available to a locality for the operation of public schools save on a conditional or a matching basis—that schools be

operated and there be, as a condition precedent, local effort (Tr. 477, *et seq.*)

This plan of making state funds available to the autonomous local school boards only upon a matching basis is no new thing and was not done to meet the conditions created by the school segregation decisions. It is a plan which has been in effect in Virginia for approximately forty years. *County School Board* v. *Griffin, supra,* 204 Va. at page 665, 133 S.E. 2d at page 576.

A county school board cannot require the Board of Supervisors to provide funds for the operation of schools. Under the Code of Virginia the Division Superintendent does have the duty to prepare annually and submit to the Board of Supervisors, with the advice of the School Board, estimates of the amount needed for the support of public schools or for educational purposes in the county (Code Section 22-120.3) and to request the Board of Supervisors to fix a levy or make such appropriation as will provide therefor (Code Section 22-120.4). But the School Board cannot *compel* the Board of Supervisors to provide such funds. That was settled in *Griffin* v. *Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E. 2d 227 (1962), which held that it was within the uncontrolled discretion of the Board of Supervisors whether a levy or appropriation would be made for school purposes.

It may therefore accurately be stated that under the Constitution and statutes of Virginia, which long antedate the school litigation, the County Board of Supervisors, the local legislative body, determines whether the School Board shall have money with which to establish, maintain and operate the schools. If it makes money available for that purpose, the School Board alone determines within the limits of the budget it presented to the Board of Supervisors how those moneys shall be spent. *Board of Supervisors of*

Chesterfield County v. *School Board of Chesterfield County*, 182 Va. 206, 28 S.E. 2d 698 (1944).

Though the provisions of the Constitution and statutes dealing with the financing of school operations are clearly the key to local autonomy with regard to public schools in Virginia, this plan of local autonomy is carried out in the provisions for the *operation* of the schools.[6]

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[6] The following statutes from Title 22, Code of Virginia (1950), as amended, illustrate this fact:

1. The power to determine the length of the school term is vested solely in the local school board, for Code Section 22-5 provides:

> "The school board of each county and city in the state is empowered to maintain the public free schools of such county and city for a period of at least nine months * * *."

That it may set the term at less than nine months or for no period at all is made clear by further language in that section which says that if the schools are operated for a term less than nine months any state appropriations shall be reduced proportionately.

2. Teachers are selcted and employed by the local school boards (Code Section 22-203).

3. The local school board determines the salary of the teachers (Code Section 22-72). It does not have to follow any minimum schedule established by the State—despite a finding to contrary by the District Court in the order of October 10, 1962.

4. The division superintendent is elected by the local school board pursuant to Section 133 of the Constitution and Code Sections 22-32 and 22-33.

5. Code Sections 22-233, *et seq.*, establish certain fundamental subjects to be taught and other subjects are determined by the local school board.

6. From a list of suitable textbooks prepared by the State Board, the local board selects those to be used (Section 132 of the Constitution and Code Section 22-296).

The local school board may withdraw from the statutes dealing with textbooks (Code Section 22-318).

7. Final power in connection with suspension or expulsion is vested in the local school board (Code Sections 22-230, 22-231).

Therefore, local authorities not only control and determine whether there shall be any schools and if so what schools there shall be, they also determine the extent, if any, to which the schools will be supported and maintained. If schools are to be operated, certain subjects must be taught and teachers with certain qualifications are to be employed. The State stands by, through the State Board of Education, to give advice and assistance, but the operation of the schools lies with the locality. Indeed, the fundamental duty of the State Board is expressed in Section 22-21 of the Code of Virginia to be:

> "* * * to do all things necessary to *stimulate* and *encourage* local supervisory activities and interest in the improvement of the elementary and secondary schools * * *." (Emphasis supplied.)

This places upon the State Board the right to "stimulate and encourage"—not the right to "operate and control."

There is no section of the Constitution or statutes of Virginia which authorizes any state official or any state agency to go into a county and open or operate a public school. The Superintendent of Public Instruction testified (Tr. 115):

> "There is no provision in law which would authorize the State Board of Education to start operating public schools in any county or city."

It is therefore clear that the Commonwealth has no voice in determining whether schools are to be established or maintained. If local authorities desire schools to be established and maintained and make provisions therefor and

operate them in a certain way, then state funds are available to assist.

This is the Virginia system and the courts of the Commonwealth have so held.

SUMMARY OF ARGUMENT

1. The cause of action alleged by petitioners in their supplemental and amended supplemental complaints, the latter of which was filed in the spring of 1961 and is the pleading upon which this phase of the case is based, is a new and different cause of action from that alleged in the original complaint. The cause of action alleged in the original complaint pertained to the constitutionality of segregation in the public schools operated by the respondent County School Board—a cause of action properly asserted against the School Board as the defendant. The cause of action alleged in the amended supplemental complaint pertains to the question whether taxes must be levied and funds appropriated for the operation of schools in the County—a cause of action which is *not* properly asserted against the School Board or the Division Superintendent of Schools. The School Board has stated that it will operate schools in the County should funds be made available to it (R. 79).

That the question raised by the amended supplemental complaint was not involved in the original case or decided by the courts in the original case is made clear when it is recognized that the schools of the County had been closed for almost a year at the time the District Court entered its order of April 22, 1960, restraining these respondents from racial discrimination in "the high schools operated by the defendants in the County * * *" (R. 18).

The law is clear that a party may not inject a new cause of action into a pending suit, nor may he seek relief of a different kind or on a different principle, by supplemental pleadings. The reason for this is likewise clear—to avoid the very confusion and disorder that is found in the instant case. As a direct result of the confusion and disorder here present, the courts below have not considered the question that is now before this Court—namely, can or should a federal court compel a local governing body to levy taxes and appropriate funds for the operation of public schools. Because of the importance of that question it should not be decided by this Court until the lower courts have had full opportunity to give mature consideration to it with the benefit of briefs and argument by the parties.

2. More particularly, nothing contained in the suit at this point is related to the respondents, School Board and Division Superintendent of Schools. They are guilty of nothing which violates the injunction of the District Court of April 22, 1960 or which violates any constitutional rights of petitioners. In fact, there are no direct allegations against them in the amended supplemental complaint save that dealing with their alleged intention to dispose of school property. That allegation was dismissed by the District Court and the Court of Appeals in effect affirmed the District Court on that point, Petitioners make no reference to that point in their brief so it is assumed that they have abandoned it.

So far as the other allegations of the petitioners are concerned—those dealing with funds for the operation of schools and tuition grants—it is clear that these respondents have no duties or powers with respect to them. Therefore, it is their position that this phase of the suit should be dismissed as to them and that no orders should be entered against them.

ARGUMENT

I. The Amended Supplemental Complaint Filed by Petitioners Upon Which the Proceedings Now Before this Court Are Based Presents a New and Different Cause of Action from that Presented in the Original Complaint and Should Be Dismissed.

At every stage of the phase of this suit initiated by petitioners' supplemental and amended supplemental complaint, all respondents vigorously and repeatedly asserted that those so-called "supplemental" pleadings alleged and stated a new cause of action from that stated in the original pleadings and hence should have been dismissed. This point was raised by objection to the filing of such complaints and by motions to dismiss after they were filed—and the objections and motions were fully briefed and argued before the trial court. That court on July 7, 1961—a year after the question was first raised by respondents—entered an order overruling the motions without prejudice to respondents to renew them at the conclusion of the hearing (R. 182). The motions were so renewed and were overruled by the court upon entry of the order of October 10, 1962 (R. 83). No reason for such action was ever given by the District Court.

Of course, it is necessary to determine the nature of the original cause of action and the relief obtained thereon before it is possible to determine whether the supplemental pleadings allege a *new* cause of action and seek new and different relief. This was never done by the District Court in spite of respondents' repeated efforts to have it so do. Such determination is important, indeed absolutely necessary, because the supplemental pleadings of the petitioners alleged that the

> "action, inaction and contemplated action of each and all defendants was, has been, and will be taken for the sole purpose of circumventing and frustrating the enforcement of the order of the court requiring the racial desegregation of the public schools of Prince Edward County * * *." (Par. 17 of the Amended Supplemental Complaint.) (R. 27)

It is elementary that before a determination can be made of whether certain action or inaction "circumvents" or "frustrates" an order, or renders it "unenforceable" and "ineffective" (Par. 11 of the Amended Supplemental Complaint) (R. 25), it is essential that the meaning of that order be ascertained. If the action or inaction of the respondents does not and cannot in fact circumvent or frustrate the enforcement of it, or does not and cannot render it unenforceable and ineffective, then petitioners are entitled to no relief upon their allegations and prayers. Yet, in spite of respondents' continued efforts to get the trial judge to make this basic determination and to state it, he refused so to do. Rather, he proceeded throughout upon the implied assumption that the order of April 22, 1960, would be violated—for actionable "circumvention" and "frustration" can be nothing else than "violation"—by the closing of the schools in Prince Edward County. It is inconveivable that a complaint predicated upon the alleged violation of an order could be decided without a judicial determination of the meaning of that order. We submit that a mere reading of the order of April 22, 1960 (R. 18), is sufficient to reach the conclusion that it does not require that any public school be operated in Prince Edward County. By that order it was decreed:

> "That the defendants * * * be, and they hereby are, restrained and enjoined from any action that regulates

> or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, *to the high schools operated by the defendants in the County* * * *." (Emphasis supplied.)

This is the order described in paragraph 17 of the amended supplemental complaint as "requiring the racial desegregation of the public schools of Prince Edward County" (R. 27). Petitioners contended that this order required the operation of public schools in Prince Edward County for by prayer (a) of the amended supplemental complaint they asked that defendants be enjoined

> "From refusing to maintain and operate an efficient system of public free schools in Prince Edward County, Virginia." (R. 27.)

We submit that the order of April 22, 1960, did not require the operation of schools in the county but only restrained segregation in such schools that *were* operated. If a mere reading of this plain and unambiguous order is not enough to satisfy this Court of its true meaning, a brief review of the situation as it was prior to and at the time of the entry of the order should do so.

In January, 1957, the District Court recognized that probably the schools would be closed if racial mixing was required. In *Davis* v. *County School Board*, 149 F. Supp. 431, at page 439, the trial judge said:

> "Laying aside for the moment the probability of the schools being closed, in the present state of unrest and racial tension in the county it would be unwise to attempt to force a change of the system until the entire situation can be considered and adjustments gradually brought about."
>
> * * *

> "Action which might cause mixing the schools at this time, resulting in closing them, would be highly and permanently injurious to children of both races."

The Court of Appeals also was aware of this probability for it said on November 11, 1957, in *Allen* v. *County School Board*, 249 F. 2d 462, at page 465:

> "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it."

And the trial court after hearing evidence in regard to conditions in Prince Edward County stated in 1958 in *Allen* v. *County School Board*, 164 F. Supp. 786, at page 789:

> "They expressed apprehension with respect to both violence and the closing of the schools if the motion of the plaintiffs should be granted."

Then on May 5, 1959, the Court of Appeals, with full knowledge that schools might be closed, directed that

> "The District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs * * * *to the high schools operated by the defendants in the County* * * *." (Emphasis supplied.) (*Allen* v. *County School Board*, 266 F. 2d 507, at page 511.)

Subsequent to that decision in June of 1959, the Board of Supervisors of Prince Edward County refused to levy taxes or appropriate money for public schools, as the result of which the schools did not open in September, 1959.

It was not until April 22, 1960—almost a year after the

Board of Supervisors refused to make a levy or appropriation for public schools and during which time schools were closed, all of which was known to petitioners, the District Court and the Court of Appeals—that at the request of petitioners the order of April 22, 1960, was entered. Had the District Court intended to require the operation of schools in Prince Edward County, it surely would have done so in language clear and unmistakable. As was said in *Haskell* v. *Kansas Natural Gas Company*, 224 U. S. 217 (1912), at page 223:

> "But the decree [*i.e.*, an injunction decree] must be read in view of the issues made and the relief sought and granted."

It is thus clear that until the supplemental pleadings were filed the "cause of action" being prosecuted by petitioners was to obtain an injunction against enforced segregation.

The Court of Appeals on the occasion of the last appeal to it in this case prior to the filing of the supplemental pleadings and the addition of new defendants described the cause of action involved in the original proceedng by stating in 266 F. 2d at page 508:

> "The original complaint was based on the proposition that the segregation of the races in the public schools of a state is a violation of the Federal Constitution * * *."

Upon that question this Court in *Brown* v. *Board of Education*, 347 U. S. 483, pronounced, at page 495:

> "* * * that plaintiffs * * *, are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

"Cause of action" is defined as referring "to the specified conduct of the defendant upon which plaintiff bases his claim for relief." *Popovitch* v. *Kasperlik*, 76 F. Supp. 233 (W. D. Pa. 1947), at page 238. It is apparent that the petitioners, the District Court, the Court of Appeals, and this Court have all recognized that the specified conduct of the respondents School Board and the Division Superintendent of Schools from which relief was sought in the original proceedings was the *enforced* segregation of the races *in the public schools* of Prince Edward County.

By their supplemental pleadings petitioners seek relief form a new and different "specified conduct of the defendant"—namely, from the failure to maintain and operate public schools in Prince Edward County. Recognizing that this failure could not be attributed to any action or inaction of the original defendants, petitioners (plaintiffs below) added four new defendants: The Board of Supervsors of Prince Edward County, the State Superintendent of Public Instruction, the State Board of Education, and the County Treasurer.

In an attempt to seek some supplemental relief from the original defendants and thus supply a connection between the original cause of action and the new cause of action, petitioners alleged that the County School Board was contemplating a conveyance, lease or transfer of the public schools and public school property and asked that it be enjoined from doing so. Such allegation, even if true, and the prayer for relief based upon that allegation, is not supplemental to the original proceedings which did not seek to compel the operation of public schools. That allegation was not true and there was no evidence to support it. Upon the County School Board's motion for summary judgment upon this allegation contained in Section V, paragraph 16 of the amended supplemental complaint (R. 26), the District Court dismissed

it by order of May 24, 1962 (R. 69). That was the only allegation of the amended supplemental complaint against either of the original defendants. There was no allegation against the Division Superintendent of Schools.

Therefore, the amended supplemental complaint seeks entirely new and different relief from entirely new and diferent "specified conduct" than that alleged by the original complaint, and, further, seeks it from entirely new and different defendants. This, we submit, is not permitted by Rule 15(d) of the Federal Rules of Civil Procedure under which petitioners proceeded. In *Chicago Grain Door Co.* v. *Chicago,* 137 Fed. 101 (7th Cir. 1905) at page 103, it was stated:

> "Jurisdiction to entertain such a complaint can only be granted where it is desired to aid or effectuate a prior decree or to seek relief, not of a different kind or on a different principle, but on the same lines as the original bill."

In *Ebel* v. *Drum,* 55 F. Supp. 186 (Mass. 1944), it was held that a supplemental pleading should not be allowed when it presents "a controversy of a substantially different nature, involving far different factual and legal considerations" from that of the original cause.

Upon the question of the availability of supplemental pleadings to effectuate a prior decree of the court, which petitioners claim is necessary here, this Court said in *Dugas* v. *American Surety Co.,* 300 U. S. 414 (1937), at page 428:

> "The jurisdiction to entertain the supplemental bill is free from doubt. Such a bill may be brought in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect, *but*

> *subject to the qualification that the relief be not of a different kind or on a different principle.*" (Emphasis supplied.)

If the public schools were being operated in Prince Edward County and if any action of the respondents were regulating or affecting on the basis of race or color the admission, enrollment or education of the infant petitioners, a supplemental complaint would be entirely proper. But it is not proper when public schools are not being operated and the issue raised by the supplemental pleadings is whether they must be operated. The relief sought by the supplemental complaint is of a different kind and on a different principle than that of the original suit and should be litigated in a separate and independent suit. The reason a new cause of action should not be injected by supplemental pleadings is stated in *U. S.* v. *Southern Pac. Co.*, 75 F. Supp. 336 (Ore. 1947), at page 339:

> "A new and distinct law suit should never be injected into a case by filing a supplemental pleading. This rule is inherent in all systems of pleading, common law, code or federal. It is required by the necessities. Confusion would otherwise result."

The confusion of which the Court spoke in *U. S.* v. *Southern Pac. Co., supra*, has been present in the instant case from time the amended supplemental complaint was filed until today. The positions taken by the petitioners, by the United States and by the District Court have not been unlike the magician's rabbit—"Now you see it, now you don't." Instead of the case coming to this Court based on the firm foundation of mature decisions of the District Court and the Court of Appeals, made with the position of

the petitioners being clearly stated and respondents' defenses thereto, it comes here grounded on quicksand.

First, in the original suit, petitioners sought an injunction against racial discrimination in the public schools operated by the School Board. Then, by their amended supplemental complaint, petitioners sought to enjoin the School Board and the Division Superintendent of Schools, together with various new defendants, from refusing to maintain and operate public free schools in the County—in effect a mandamus (R. 27).

When the case arrived in the Court of Appeals a third position was taken by petitioners. There they asked that the State Board of Education, one of the new defendants, be enjoined "from approving the payment of state funds for the support of public education anywhere in the State so long as public schools in Prince Edward County remain closed."

Now, in this Court they ask that "the respondents" (which respondents they do not identify) be enjoined "from failing to take the necessary steps—*i.e.*, levying the required taxes and appropriating sufficient funds for the operation of the public schools in Prince Edward County * * *"—again, the mandamus approach.

The holdings of the District Court have been equally elusive. The ultimate question decided by the District Court in its order of October 10, 1962 (R. 83), was not whether petitioners were being discriminated against in the public schools of Prince Edward County which would have been a proper queston in this case. It was not even whether respondents could be enjoined from refusing to maintain and operate public free schools in Prince Edward County—in effect a mandamus—which was the question raised by the amended supplemental complaint. The question that was decided by the District Court was whether the public schools

of Prince Edward County may be closed while other public schools in the State remain open, and the "specified conduct" of the respondents is allegedly that of allowing other schools of the Commonwealth to remain open while those of Prince Edward are closed, conduct which by no stretch of the imagination can involve the two original defendants. It is clear that the School Board of Prince Edward County and its Division Superintendent have not a scintilla of a voice in determining whether or how schools be operated elsewhere.

And it was decided in spite of the memorandum opinion of June 14, 1961 (by which the United States was denied leave to intervene in this case), in which the District Judge recognized and held that the *amended supplemental complaint did not seek to enjoin the expenditure of state funds* "for the maintenance of free public schools throughout the rest of Virginia so long as the free public schools of Prince Edward County remain closed" (R. 173).

Further, in that same opinion, referring to the fact that by its complaint in intervention the United States did seek to so enjoin the payment of state funds, the District Judge stated:

> "These are not questions of law or fact in common with the main action. To the contrary, they are *new and independent assertions, which admittedly are not alleged in the Amended Supplemental Complaint.*" (Emphasis supplied.) (R. 174)

The position of the United States has likewise varied from stage to stage of this suit. When it sought to intervene in the District Court, it sought to close public schools throughout Virginia until the schools of Prince Edward County were opened. Then in the Court of Appeals and now in this

Court it takes a different position—namely, that the Board of Supervisors should be compelled to levy taxes and appropriate money for school purposes.

The question whether a federal court can compel a local legislative body to levy taxes and appropriate money for public school purposes is among the most important and far-reaching questions ever to come before this Court—it goes to the very vitals of our federal system of government. It now is thrust upon this Court without having been briefed, argued or considered by the District Court or the Court of Appeals. True it is, as this Court said in its *per curiam* opinion granting *certiorari* in this case, that the questions presented are of great importance. This is all the more reason for it not to be decided by this Court until it has been properly pleaded, briefed, argued and decided by the courts below.

It is late in the proceeding for the case to be dismissed on this ground, but such is not the fault of respondents. Each of them has raised the question fully and fairly at every stage possible and proper. The regrettable state of the case results directly from the failure of the District Court to keep the case within the scope and bounds prescribed by a proper application of the Rules. Had the District Court considered these motions to dismiss the amended supplemental complaint for the reasons stated, the ultimate question would undoubtedly have been before this Court long before now in such posture that it properly could have been decided. That the District Court failed to so act is no reason to deprive respondents of that to which they are entitled. These respondents respectfully urge this Court to meet this issue. If it will, respondents submit that the Court will then dismiss the amended supplemental complaint even at this late stage.

II. No Action Has Been Taken By Respondents Which Violates Any Constitutional Rights of Petitioners

The Fourteenth Amendment to the Constitution of the United States provides in part:

> "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws." *U. S. Const.* amend. XIV, § 1.

Brown v. *Board of Education*, 347 U. S. 483 (1954), held:

> "In each of the cases, minors of the Negro race * * * seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. (347 U. S. at page 487)
>
> * * *
>
> "Therefore, we hold that the plaintiffs * * * are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (347 U. S. at page 495)

Allen v. *County School Board*, 266 F. 2d 507 (4th Cir. 1959), required:

> "* * * that the District Judge issue an order enjoining the defendants from any action that regulates or affects on the basis of color the admission, enrollment or education of the infant plaintiffs, * * * to the *high schools operated by the defendants* in the County; and requiring the defendants to receive and consider the applications of such persons for admission to the white high school of the County on a non-racial basis without regard to race or color; * * * and also requiring the

School Board to make plans for the admission of pupils in the *elementary schools of the County* without regard to race and to receive and consider applications to this end at the earliest practicable date." (Emphasis supplied.) (266 F. 2d at page 511)

The order of the District Court entered April 22, 1960, on the mandate contained in 266 F. 2d 507, above, provided:

"2. That the defendants, * * * be, and they hereby are, restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, * * * to the *high schools operated by the defendants in the County* and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.

"3. That the defendants make plans for the admission of pupils in the *elementary schools of the County* without regard to race or color and to receive and consider applications to this end at the earliest practicable day." (Emphasis supplied.) (R. 18)

The rules under which this case must be fought are thus drawn—the basic, fundamental, constitutional provision and the interpretation of it as applied to these respondents. Reduced to simplicity, if these respondents have *violated* the rules that have been formulated by the courts as set out above—then this Court should so hold. If these respondents have not *violated* the rules—then this Court should so hold.

The question is not whether the rules have been circumvented or frustrated—the question is have they been violated. Has the School Board of Prince Edward County or T. J. McIlwaine, Division Superintendent of Schools taken

"any action that regulates or affects on the basis of race or color the admission, enrollment or education" of petitioners to the "high schools operated by" the School Board? Have they failed "to receive and consider the applications of such persons for admission to *such* high schools without regard to race or color"? (Emphasis supplied.) Have they failed to "make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to consider applications to this end * * *"?

If the answer to any one of these questions is in the affirmative, then these respondents have violated the rules. If the answer to each question is in the negative, there has been no violation. The same is true with respect to the other respondents.

The answer to each of these questions must be in the negative—from the moment the District Court entered its order of April 22, 1960, no racial segregation has been enforced in Prince Edward County. That order did not say that public schools must be operated and that in the operation thereof there should be no segregation enforced by law. Petitioners assume an unwarranted interpretation of that order and then use it as the premise upon which to base their case. If words mean what they say, that effort must fail.

So far as these respondents are concerned—the original defendants—it is crystal clear that there is nothing charged against them in the case as it now stands before this Court. The only allegation against either of them in the amended supplemental complaint is found in Section V, paragraph 16 (R. 26)—that pertaining to the "intended" disposition of school property by the School Board. As heretofore shown the District Court granted the motion of the School Board for summary judgment as to the cause of action there alleged and entered an order dismissing it (R. 69).

In effect, the Court of Appeals affirmed the District Court on this point. *Griffin* v. *Board of Supervisors, supra, 322* F. 2d at page 335 (R. 213).

So the bridge which petitioners sought to construct between the original cause of action and the new cause of action disappears and with it any concrete allegations against the original defendants.

However, throughout the phase of the litigation initiated by the amended supplemental complaint, petitioners have made blanket charges against all respondents—seldom leveling the charge at a specific respondent. It began by paragraph 17 of their amended supplemental complaint (R. 27) and has continued to their brief filed in this Court (p. 14). In paragraph 17 of the amended supplemental complaint petitioners claim respondents have "circumvented and frustrated" rights established by the order of the District Court entered on April 22, 1960; on page 14 of their brief petitioners claim respondents have "defeated and frustrated" a so-called right that has not yet been determined, to-wit: the "right to unsegregated education."

Let us examine the words "circumvent" and "frustrate" so frequently used by petitioners—and also used by the District Court in its opinion of August 23, 1961 (R. 60).

Of course, any action which violates an injunctive order is illegal; an action which does not violate it is permissible. We know of no half-way point. If an action is contrary to the injunction or obstructs the enforcement of it, that action of course violates the order. We so understand the words "circumvent" and "frustrate" in this connection. To charge that actions circumvent and frustrate an injunctive decree and are therefore not permissible is to charge that they violate the decree. If they do not violate the decree, if they are not contrary to that which the decree orders, there is noth-

ing illegal in the actions and they are permissible so far as the decree is concerned.

The petitioners gain nothing by charging that actions circumvent or frustrate a decree—they do not weaken the burden which rests upon them. To sustain their allegation, they must show that the decree has been violated. In this litigation they have taken the position that they may prevail with something less than that. They say, in effect, that if the actions of the respondents, otherwise lawful, prevent the petitioners from reaping all that they had hoped to get from the decree, then the decree is circumvented and those actions, otherwise lawful, may be enjoined even though they do not violate the decree.

In this case, or in any other, the question is not whether petitioners have obtained the relief which they thought they had—it is not even whether they have obtained the relief which this Court, the Court of Appeals or the District Court thought would result to petitioners from their respective opinions and orders. If respondents have "circumvented" or "frustrated" the desires of the petitioners or the expectations of this Court, it does not follow that the decrees of the courts have been circumvented or violated. If such were the test, then we would have a government of men, not a government of laws.

Thus, we submit that this Court should remove and forever put to rest the loose and dangerous terms—circumvent and frustrate—in the field of constitutional interpretation and in the determination of whether an order of a court has been violated.

Though, in this case, the *desires* of petitioners may have been circumvented or frustrated, it is clear that the decrees of the courts and the constitutional rights of petitioners have not been. The decree effectuates today everything

sought by the original complaint and everything provided for by the decree is in effect—an end has been put to segregation in the public schools operated by the School Board. Speaking of the decree of April 22, 1960, the Court of Appeals said that it had not been violated because discriminatory practices were abandoned when the schools were closed (R. 215).

Without doubt, the School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, have not done nor failed to do anything which violates any constitutional right of petitioners or which violates the order of any court in this case. Other than the broad assertions against all respondents previously referred to, petitioners in their brief make only three statements that can be construed as relating to these respondents. First, on page 9 of their brief, petitioners state that the District Court directed the School Board to present a plan by September 7, 1962, for the admission of pupils in the elementary and secondary schools for the 1962-63 term. Petitioners further state that "at the September, 1962, hearing, no plans were submitted." That statement is not true—at the hearing on September 7, 1962, the School Board filed a plan, copies of which had been sent to all counsel on August 31, 1962, and the District Court entered an order marking it filed. See page 4 of the Transcript of Proceedings, September 7, 1962.

Second, on page 24, after stating that the Board of Supervisors refused to exercise its authority to support schools, petitioners say:

> "The other respondents have made no attempt to step into the breach."

Suffice it to say, as heretofore pointed out, the School Board possesses no power to step into the breach—in fact, it has done everything it can or is required to do.

Third, on page 34 petitioners state that respondents through a cooperative effort have deprived petitioners of their rights and though the more "obvious intransigence is on the part of the county board of supervisors, their recalcitrance has been aided, abetted and acquiesced in by the local school board * * *." The District Court in its memorandum opinion and order of October 10, 1962 (R. 82), removed the word "acquiescence" from its finding of July 25, 1962, that the action of the Board of Supervisors was taken with the "full knowledge and acquiescence" of the other respondents (R. 76). Thus, the erroneous finding was corrected.

A copy of the page proof of the brief of the United States was received by counsel for these respondents on the day this brief was scheduled at the printers. Thus no response can be made—and none appears necessary so far as these respondents are concerned. Nothing contained in the brief of the United States is directed to the School Board or the Division Superintendent, and no relief is sought against them. And such is true—in spite of the fact that these respondents were the sole defendants in the original case—because they have no power or control over the situation. It is well established that an injunction should not issue against one who has no authority or power to act. *Dawley* v. *City of Norfolk*, 159 F. Supp. 642 (1958), *aff'd.* 260 F. 2d 647 (4th Cir. 1958), *cert. denied* 359 U. S. 935 (1959).

CONCLUSION

For the hereinabove stated reasons, the respondents, County School Board of Prince Edward County and T. J. McIlwaine, Division Superintendent of Schools of said County, respectfully submit that the amended supplemental complaint be dismissed as to all respondents or, at the least, that it should be dismissed as to them.

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Constitution of Virginia, Article IX, Sections 129 through 136 and Section 141

§ 129. Free schools to be maintained.—The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.

§ 130. State Board of Education; composition; vacancies, how filed.—The general supervision of the school system shall be vested in a State Board of Education, to be appointed by the Governor, subject to confirmation by the General Assembly, and to consist of seven members. * * *

§ 131. Superintendent of Public Instruction; appointment; term of office; how elected; duties.—A Superintendent of Public Instruction, who shall be an experienced educator, shall be appointed by the Governor, subject to confirmation by the General Assembly, for a term coincident with that of each Governor making the appointment; * * * provided * * * that the General Assembly shall have power, by statute enacted after January first, nineteen hundred and thirty-two, to provide for the election or appointment of a Superintendent of Public Instruction in such manner and for such term as may be prescribed by statute. * * * The powers and duties of the Superintendent of Public Instruction shall be prescribed by law.

§ 132. Powers and duties of State Board of Education. —The duties and powers of the State Board of Education shall be as follows:

First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having